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August 13, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 13, 2004

Case No.: TIA-0081

XXXXXXXX XXXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband, XXXXXXXX XXXXXXXX (the Worker) was a contractor employee at a DOE facility for many years. An independent Physician Panel (the Physician Panel or the Panel) determined that the Worker's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals. 1/ As explained below, we have concluded that the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this

1/ The Applicant's appeal was filed on her behalf by the Applicant's daughter, XXXXXXXX XXXXXXXX, who holds Power of Attorney for the Applicant.

program and has a web site that provides extensive information concerning the program. 2/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the Applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the Applicant asserted that for approximately 29 years the Worker was an employee at the DOE's facility in Oak Ridge, Tennessee, where he worked in the K-1401 and K-1420 areas within the K-25 plant. She stated that he was exposed to radioactive materials, toxic chemicals, asbestos, degreasers, acids, heat and noise, radiation and hazardous materials in the workplace. She claimed that his exposure to these substances resulted in the following illnesses or conditions during the period 1989 through 1992: (i) noncalcified irregular right middle lobe nodule; (ii) moderate obstructive lung disease; and (iii) kidney disease/dialysis. The Worker died in March 1995.

In its determination, the Physician Panel considered the medical information concerning the Worker's illnesses that had been

2/ See www.eh.doe.gov/advocacy.

submitted by the Applicant. It rejected the Applicant's contentions that the Worker's exposure to toxic substances at a DOE facility caused, contributed to, or aggravated any of the Worker's documented illnesses. Specifically, it made the following findings:

The panel felt that the lung nodule was a descriptive term and was not an actual diagnosis that could be evaluated for causality, contribution or aggravation. The panel did not see evidence of an exposure at a DOE facility that would cause moderate obstructive lung disease; [The Worker] had a substantial history of smoking which is the most common cause of obstructive lung disease. According to [the Worker's physician], his kidney disease was due to his hypertension, vascular disease, and diabetes.

Panel Report at 1.

The OWA accepted the physician panel's determination. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the Applicant contends that the physician panel determination is erroneous. On December 19, 2003, the Applicant had submitted an EEOICPA claim to the Department of Labor (DOL) contending that the Worker's exposure to toxic materials in the workplace was a contributing factor to Chronic Obstructive Pulmonary Disease (COPD) and Chronic Beryllium Disease (CBD). In a *Notice of Final Decision* dated April 2, 2004 (the *DOL Final Decision*), the DOL determined that the Worker's employment at the K-25 Facility was sufficient to meet the requirement of an occupational or environmental history, or epidemiologic evidence of beryllium exposure. It further concluded that the factual and medical evidence concerning the Worker met the criteria for CBD set forth at Section 73841(13)(B) of the EEOICPA. On the basis of the finding in the DOL decision, the Applicant requests that her claim be reopened so that the evidence of the Worker's exposure to beryllium and CBD can be considered by the Panel.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for

the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

As discussed above, the Panel determination addressed the Applicant's claim that the Worker suffered from (i) noncalcified irregular right middle lobe nodule; (ii) moderate obstructive lung disease; and (iii) kidney disease/dialysis. The Applicant does not object to any of the specific findings made by the Panel concerning these illnesses. In the claim that she submitted to the DOE, the Applicant *did not* assert that the Worker was exposed to beryllium at a DOE facility or that he suffered from CBD. 3/ Accordingly, the Panel's failure to consider beryllium exposure or CBD was not a deficiency or error. Because the Applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Therefore the appeal will be denied. However, the Applicant is claiming a new illness and has presented evidence concerning the Worker's possible beryllium exposure at a DOE facility and resulting CBD. Under these circumstances, the Applicant should consider filing a request with the OWA for panel review of this issue.

3/ In fact, the only reference to beryllium exposure that I found in the DOE record of this claim was a document entitled "Pulmonary History" dated December 18, 1974. The document is unsigned but appears to have been completed by someone who interviewed the Worker. It indicates that the Worker never worked with asbestos or beryllium. See Record of Claim at 523.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0081 be, and hereby is, denied.
- (2) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 13, 2004